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IN THE UNITED STATED DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

National Fair Housing Alliance, Inc., et al.,

Plaintiffs,

vs.

A.G. Spanos Construction, Inc., et al.

Defendants.

CASE NO. C07-03255-SBA

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE SPANOS DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT OR, ALTERNATIVELY, FOR PARTIAL DISMISSAL OF PLAINTIFFS' FIRST AMENDED COMPLAINT

[Fed. R. Civ. P. 12(b)(6)]

Hearing Date: February 26, 2008
Time: 1:00 p.m.
Dept: Courtroom 3

Complaint Filed: June 20, 2007

TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY OF ARGUMENT. 1

II. ALLEGATIONS OF THE COMPLAINT AND MATTERS SUBJECT TO JUDICIAL NOTICE. 3

A. Parties. 3

B. Allegations of Non-Compliance with the FHAA. 4

C. Alleged "Injury" to Plaintiffs. 5

D. Relief Sought by Plaintiffs. 7

E. "Missing" Allegations. 7

F. Matter Subject to Judicial Notice. 8

III. STANDARDS GOVERNING MOTIONS UNDER RULE 12(b)(6). 9

IV. ARGUMENT. 9

A. Plaintiffs' FHAA Claim for Relief Is Barred by the Statute of Limitations As to All But Eight of the Eighty-Five Identified Properties. 9

1. The FHAA's 2-Year Statute of Limitations Runs from the Last Certificate of Occupancy Issued on Each of the Subject Properties. . . . 9

2. Plaintiffs' Untimely Claims Cannot be Saved by the Continuing Violation Doctrine, the Discovery Rule or Equitable Tolling. 10

3. Plaintiffs Cannot Circumvent the Statute of Limitations by Aggregating Alleged Violations Into A Continuing Practice. 11

B. Plaintiffs Have Not Alleged a Cause of Action in Their Own Right Because They Are Not "Aggrieved Persons" Within the Meaning of the FHAA, They Do Not Claim to Belong to the Protected Class, Their Damages Were Voluntarily Incurred, and They Failed to Sue Indispensable Parties. 11

1. Plaintiffs Fail To State A Cause of Action Because They Are Not "Aggrieved Persons." 12

2. Plaintiffs Fail To State A Cause Of Action Because They Do Not Claim To Belong to or Sue on Behalf of Members of the Protected Class. . . 14

3. Plaintiffs Have Failed to State a Claim for Damages Because, as Alleged, Their "Damages" Were Voluntarily Incurred. 16

4. Plaintiffs Have Failed to State a Claim for Injunctive Relief Because Plaintiffs Have Not Named the Owners, Renters, and Secured Lenders of the Subject Properties. 16

C. Plaintiffs Have Failed to State a Claim for Relief under the FHAA Against the Spanos Defendants Because Plaintiffs Fail to Allege That the Spanos Defendants Actually Denied, or Could Actually Deny, a Rental to Anyone. 18

D. The Complaint Fails to Allege Facts Sufficient to Establish Standing. 19

1. Plaintiffs Do Not Claim To Be Members of a Protected Class under the FHAA, Nor Do They Purport to Sue on Behalf of Any Member of a Protected Class; Therefore, They Have No Standing to Sue. 19

2. Plaintiffs Do Not Allege Facts Sufficient To Establish the "Irreducible Constitutional Minimum" for Standing. 20

3. Plaintiffs Have Not Alleged Facts Sufficient to Establish Standing to Seek Damages. 23

4. Plaintiffs Have Failed to Allege Facts Sufficient to Establish Standing to Seek Injunctive Relief Under The FHAA re The Subject Properties. . 23

V. CONCLUSION. 25

TABLE OF AUTHORITIES

Cases:

Association for Retarded Citizens v. Dallas County Mental Health & Mental Retardation Ctr. Bd. of Trustees
19 F.3d 241 (5th Cir. 1994) 20, 23

Aulson v. Blanchard
83 F.3d 1 (1st Cir. 1996) 9

B. C. v. Plumas Unified School Dist.
192 F.3d 1260 (9th Cir. 1999) 15, 20

Baltimore Neighborhoods, Inc. v. Rommel Builders, Inc.
40 F.Supp.2d 700 (D. Md. 1999) 22

Bangerter v. Orem City Corp.,
46 F.3d 1491 (10th Cir. 1995) 15

Barlow v. Evans
993 F.Supp. 1390 (D. Utah 1997) 15

Barron v. Reich
13 F.3d 1370 (9th Cir. 1994) 9

Bernhardt v. County of Los Angeles
279 F.3d 862 (9th Cir. 2002) 11

Blum v. Yaretsky
457 U.S. 991 (1982) 21

Canatella v. Stovitz
365 F.Supp. 2d 1064 (N.D. Cal. 2005) 11

City of Los Angeles v. Lyons
461 U.S. 95 (1983) 24

Clark v. McDonald's Corp.
213 F.R.D. 198 (D.N.J. 2003) 16

Conservation Law Found. of New England v. Reilly,
950 F.2d 38 (1st Cir. 1991) 24

Davis v. Passman
442 U.S. 228 (1979) 11

Doran v. 7-Eleven Inc.
2007 U.S. App. LEXIS 26143 (9th Cir. 2007) 24

Equal Rights Center v. Post Properties, Inc.
2007 U.S. Dist. Ct., LEXIS 53462 (D.C. 2007) 17

Fair Housing Council of Suburban Philadelphia v. Montgomery Newspapers
141 F.3d 71 (3d Cir. 1998) 16

Fair Housing of Marin v. Jack Combs
285 F.3d 899 (9th Cir. 2002) 21

Friends of the Earth, Inc. v. Laidlaw Envtl. Services
528 U.S. 167 (2000) 21, 23

Garcia v. Brockway
503 F.3d 1092 (9th Cir. 2007) 2, 9-11, 15

Giebeler v. M&B Associates
343 F.3d 1143 (9th Cir. 2003) 13, 16

Gladstone Realtors v. Village of Bellwood
441 U.S. 91 (1979) 20, 22, 24

Growth Horizons, Inc. v. Delaware County
983 F.2d 1277 (3d Cir. 1993) 18

H.J.M. v. K. Hovnanian at Mahwah VI, Inc.
672 A.2d 1166 (N.J. Sup. Ct. 1996) 17

Hansen v. Liberty Partners, LLC
2005 U.S. Dist. LEXIS 39187 (M.D. Tenn 2005) 16

Harris v. Itzhak
183 F.3d 1043 (9th Cir. 1999) 24

Havens Realty Corp. v. Coleman
455 U.S. 363 (1982) 20, 22

Hishon v.King & Spalding
467 U.S. 69 (1984) 9

Hotel St. George Associates v. Benjia Morgenstern, et al.
819 F.Supp. 310 (S.D. NY 1993) 18

Independent Housing Services of San Francisco v. Fillmore Center Associates
840 F.Supp. 1328 (N.D. Cal. 1993) 21

Lewis v. Casey
518 U.S. 343 (1996) 21

Lonberg v. Sanborn Theatres
259 F.3d 1029, U.S.App.LEXIS 17418 (9th Cir. 2001) 18

Lujan v. Defenders of Wildlife
504 U.S. 555 (1992) 20, 21, 24

McConnell v. FEC
540 U.S. 93 16

Michigan Protection and Advocacy Services, Inc. v. Basin
799 F.Supp. 695 (Mich. 1992) 15

Molski v. Mandarin Touch Restaurant
385 F.Supp.2d 1042 (C.D. Cal. 2005) 24

Moseke v. Miller & Smith, Inc.
202 F.Supp.2d 492 (E.D. Va. 2002) 10, 11

National Assn. for Mental Health, Inc. v. Califano
717 F.2d 1451 (D.C. Cir. 1983) 17

Nat'l. Railroad Passenger Corp. v. Morgan
536 U.S. 101, 122 S.Ct. 2061 (2002) 11

Nur v. Blake Development Corp.
655 F.Supp. 158 (N.D. Ind. 1987) 19

Phillips Petroleum Co. v. Shutts
472 U.S. 797, 105 S. Ct. 2965 (1985) 17

San Pedro Hotel, Inc. v. City of Los Angeles
159 F.3d 470 (9th Cir. 1998) 19

Sanghvi v. City of Claremont
328 F.3d 532 (9th Cir. 2003) 15

Schneider v. Whaley
417 F.Supp. 750 (S.D. NY 1976) 17

Smith v. Pacific Properties and Development Corp.
358 F.3d. 1097 (9th Cir. 2004) 22

Sprewell v. Golden State Warriors
266 F.3d 979 (9th Cir. 2001) 9

Thompson v. Mountain Peak Assocs. LLC
2006 U.S. Dist. LEXIS 36981(D. Nev. June 5, 2006) 10, 11

TOPIC v. Circle Realty
532 F.2d 1273 (9th Cir. 1976) 22

Tsombanidis v. W. Haven Fire Dep't.
352 F.3d 565 (2d Cir. 2003) 16

United States v. California Mobile Home Park Mgmt. Co.
107 F.3d 1374 (9th Cir. 1997) 15

United States v. Taigen & Sons, Inc.
303 F.Supp.2d 1129 (D. Idaho 2003) 10

Walker and Fair Housing Foundation of Long Beach v. City of Lakewood
272 F.3d 1114 (9th Cir. 2001) 23

Warth v. Seldin
422 U.S. 490 (1975) 20

Wasserman v. Three Seasons Assoc. No. 1, Inc.
998 F. Supp. 1445 (S.D. Fla. 1998) 19

Wein and Access Now, Inc. v. American Huts, Inc.
313 F.Supp.2d 1356 (S.D. Fla. 2004) 23

Whitson v. Heilig-Meyers Furniture, Inc.
1995 U.S. Dist. LEXIS 4312 (N.D. Ala. 1995) 17

Statutes:

42 U.S.C. section 3601 1

42 U.S.C. section 3604 . . . . . 2, 12, 13, 18

42 U.S.C. section 3613 . . . . . 3, 10, 13, 16, 23

Other:

Moore's Federal Practice 3D, §101.41[4] 16, 22, 23

R. Schwemm, "Barriers to Accessible Housing: Enforcement Issues in Design and Construction Cases under the Fair Housing Act, 40 V. Richmond L.Rev. 753 . . . . . 18, 19

Defendants A.G. Spanos Construction, Inc., A.G. Spanos Development, Inc., A.G. Spanos Land Company, Inc., A.G. Spanos Management, Inc. and the Spanos Corporation (collectively, "the Spanos Defendants") submit this Memorandum of Points and Authorities in support of their motion to dismiss the First Amended Complaint of National Fair Housing Alliance, Inc., Fair Housing of Marin, Inc., Fair Housing Napa Valley, Inc., Metro Fair Housing Services, Inc., and Fair Housing Continuum, Inc. (collectively, "Plaintiffs").[1]

I. INTRODUCTION AND SUMMARY OF ARGUMENT.

This is an untimely suit brought by the wrong plaintiffs against the wrong defendants. Plaintiffs are five organizations located in three states. They allege that 85 apartment complexes located in 10 states, allegedly designed and constructed by the Spanos Defendants between 1991 and 2007, do not comply with requirements of the Fair Housing Amendments Act ("FHAA"), 42 U.S.C. §§ 3601, et. seq. They make the same claim with respect to an unknown number of unidentified properties located, presumably, throughout the United States in unspecified locations. The Subject Properties allegedly contain over 22,000 apartment units. Plaintiffs seek an injunction commanding defendants to rebuild the Subject Properties to conform to the FHAA.

Plaintiffs are the wrong plaintiffs because (1) no plaintiff is disabled; (2) no plaintiff represents or sues on behalf of any disabled person; (3) no plaintiff has ever visited or attempted to rent any of the allegedly nonconforming apartments; (4) no plaintiff has or can plausibly allege that Plaintiffs consulted or referred any handicapped person who encountered non-FHAA compliant features at the Subject Properties; and (5) no plaintiff has alleged that it was harmed by the denial of a rental.

The FHAA confers a cause of action only upon the class of individuals and entities protected under its provisions. An individual denied rental of an apartment is a member of the class of persons protected under the FHAA. An entity denied rental of an apartment—because of the entity's association with disabled persons—is a member of the class of persons protected under

[1] Concurrently with the filing of this motion, Defendants are filing a Motion to Strike under F.R.C.P. 12(f), a Motion for More Definite Statement under F.R.C.P. 12(e), and a Motion to dismiss under F.R.C.P. 12(b)(7) and 19. Defendants' concurrently filed Request for Judicial Notice ("RJN"), with exhibits, applies to all four motions.

the FHAA.

An individual or entity that has not been harmed by the denial of a rental is not a member of the class of persons protected under the FHAA. An organization that has not been harmed by the denial of a rental is not a member of the class of persons protected under the FHAA and, therefore, may not state a claim for relief and may not state a claim for relief thereunder.

On the other hand, a fair housing organization may sue under the FHAA and state a claim on behalf of third-party members of the protected class, provided: (1) the fair housing organization sues on behalf of third party members of the protected class who have been harmed by the denial of a rental; and (2) the fair housing organization alleges and proves the existence of a "case or controversy" - i.e., that it has suffered an injury in fact, redressable under the FHAA, caused by defendants' violation of the rights of third-party members of the protected class.

The complaint fails to state a claim because plaintiffs sue only in their own right, and do not sue on behalf of any person or entity allegedly harmed by the denial of a rental. Plaintiffs do not claim to be disabled individuals denied rental of an apartment. Plaintiffs do not claim to be entities denied rental of an apartment because of their association with disabled individuals. Also, plaintiffs' alleged damages were voluntarily incurred, thus negating any allegation of causation.

The FHAA's 2-year statute of limitation is equally fatal to plaintiffs' complaint. The Ninth Circuit's recent decision in *Garcia v. Brockway*, 503 F.3d 1092 (9th Cir. 2007) reconfirmed the plain meaning of the FHAA's statute of limitation: "[a]n aggrieved person must bring a private civil action under the FHA for a failure to properly design and construct within two years of the completion of the construction phase, which concludes on the date that the last certificate of occupancy is issued." 503 F.3d at 1101. The 2-year statute of limitations bars plaintiffs' claims as to 77 of the 85 apartment complexes identified in the complaint – including all of the apartment complexes owned by the two named putative defendant class representatives (Knickerbocker Properties, Inc. XXXVIII and Highpointe Village, L.P.).

Plaintiffs also sue the wrong defendants. Under the FHAA, it is "unlawful" to deny a rental to a particular disabled person with a particular disability who wishes to rent a particular apartment. Yet, the complaint admits that most of the Subject Properties are not owned by any

of the Spanos Defendants, who are therefore not in any position to commit the alleged "unlawful" acts. The current owner – not the original builder – is the party in a position to deny the rental of a particular apartment to a particular disabled person who wishes to rent. Plaintiffs concede as much by their allegation that the current owners are "necessary" parties.

And the owners, of course, are indispensable parties for purposes of injunctive relief. Attempting to circumvent the requirement that indispensable parties be brought before the Court, plaintiffs seek acquiescence in the issuance of an injunction by a putative defendant class consisting of alleged owners of the Subject Properties located in some ten (10) states. However, as noted, plaintiffs' claims against the two putative defendant class representatives are barred by the statute of limitations. Further undermining the viability of the putative defendant class, plaintiffs fail even to allege that this Court has personal jurisdiction over the absent class members, who are located throughout the United States.

Further, under 42 U.S.C. section 3613(d), Plaintiffs – who seek an order mandating a retrofitting of apartment complexes located throughout the United States – are required to afford due process to the tenants of each affected unit (i.e., to people who actually live in the units), as well as to the lenders whose loans are secured by the affected properties. Plaintiffs have failed altogether even to allege an effort to put these two critical groups of affected parties on notice.

II. ALLEGATIONS OF THE COMPLAINT AND MATTERS SUBJECT TO JUDICIAL NOTICE.

A. Parties.

Plaintiffs are: (1) the National Fair Housing Alliance, a non-profit entity with its principal place of business in Washington, D.C.; (2) Fair Housing of Marin, "a non-profit community organization located in San Rafael, California;" (3) Fair Housing of Napa Valley, "a non-profit community organization located in Napa, California;" (4) Metro Fair Housing Services, "a non-profit community organization located in Atlanta, Georgia;" and (5) The Fair Housing Continuum, a "non-profit organization committed to equal housing opportunity and the elimination of discrimination in Florida." FAC, ¶¶ 1, 15-19.

Plaintiffs' alleged "missions" include advocating for the rights of people with disabilities

to accessible housing, promoting equal housing opportunities, and eliminating housing and lending inequities. FAC, ¶¶ 15-18.

Defendants A.G. Spanos Construction, Inc., A.G. Spanos Development, Inc., A.G. Spanos Land Company, Inc., A.G. Spanos Management, Inc., and The Spanos Corporation are California corporations with principal offices in Stockton. FAC, ¶¶ 20-25.

Plaintiffs allege that the Spanos Defendants "no longer own most of the "known" and "unknown" apartment complexes for which relief is requested." FAC ¶ 30. They also allege the existence of a **defendant class** consisting of "current owners of non-compliant [apartment] units." FAC, ¶ 30. **Plaintiffs allege that all current owners are "necessary parties in order to effectuate any judgment or order for injunctive relief requested by plaintiffs."** FAC, ¶ 30. Plaintiffs sue Knickerbocker Properties, Inc. XXXVIII and Highpointe Village, L.P. "individually and as representatives of [the putative "known" and "unknown" current owner] class." FAC, ¶ 32. Knickerbocker Properties, Inc. XXXVIII is alleged to own two apartment complexes: "Mountain Shadows" and "The Commons." FAC, ¶ 33. Highpointe Village, L.P. is alleged to be the owner of Highpointe Village, in Kansas. FAC, ¶ 34.

B. Allegations of Non-Compliance with the FHAA.

Plaintiffs allege that the Spanos Defendants "have been involved in the design and construction of approximately 85 multifamily complexes in California, Nevada, Arizona, Colorado, New Mexico, Texas, Kansas, North Carolina, Georgia and Florida." FAC, ¶ 27. Plaintiffs claim to have identified 35 apartment complexes in California, Arizona, Nevada, Texas, Kansas, Georgia, and Florida (the "Tested Properties"), totaling more than 10,000 individual apartment dwelling units, that do not meet the accessibility requirements of the FHAA. FAC, ¶¶ 3, 30. No plaintiff alleges it is located in, does business in, or counsels persons in Nevada, Arizona, Colorado, New Mexico, Texas, Kansas, or North Carolina.

With respect to the Tested Properties, Plaintiffs allege that since 1991 the Spanos Defendants have "engaged in a continuous pattern and practice of discrimination against people with disabilities" by "designing and/or constructing" apartment complexes that deny full access to and use of the facilities as required under the FHAA. FAC, ¶ 4.

Plaintiffs also allege on information and belief that 49 additional apartment complexes in 10 states which the Spanos Defendants designed or constructed (the "Untested Properties") also violate FHAA accessibility requirements. FAC, ¶ 6 and Appendix A to Complaint. The Spanos Defendants are also alleged to have designed or constructed an unspecified number of additional unidentified apartment complexes located in states not yet known to Plaintiffs. FAC, ¶ 28. The Subject Properties allegedly include over 22,000 individual apartments. FAC, ¶ 80.

Plaintiffs claim to have "identified at least one FHAA violation and, in most cases, multiple violations, at each of the Tested Properties." Based on the alleged frequency and similarity of these violations, Plaintiffs allege "a pervasive pattern and practice of designing and constructing apartment communities in violation of the FHAA accessibility design requirements." FAC, ¶ 45. Alleged FHAA violations at the Tested Properties also include failure to design and construct the public and common areas so that they are readily accessible to and usable by people with disabilities. FAC, ¶¶ 45-47. As for the Untested Properties, Plaintiffs allege only that they were designed and/or constructed after March, 1991. FAC, ¶ 6.

As alleged in the Complaint, no plaintiff is located in the same city or county where the tested apartments sued on are located.[2]

C. Alleged "Injury" to Plaintiffs.

Plaintiffs allege injury as follows:

> 72. As a result of the A.G. Spanos Defendants' actions described above, Plaintiffs have been directly and substantially injured in that they have been **frustrated in their missions to eradicate discrimination in housing**, and in carrying out the programs and services they provide, including encouraging integrated living patterns, educating the public about fair housing rights and requirements, educating and working with industry groups on fair housing compliance, providing counseling services to individuals and families looking for housing or affected by discriminatory housing practices and eliminating discriminatory housing practices.
>
> 73. As outlined above, each Plaintiff has invested

[2] Rohnert Park is in Sonoma County, but it is 35 miles from Napa, where Fair Housing of Napa Valley is located. See RJN, Ex. 172. Wesley Chapel in Pasco County, Florida, is 132 miles from Cocoa, Florida, in Brevard County. RJN, Ex. 173.

considerable time and effort in **educating its respective communities**[3] about the importance of accessible housing for people with disabilities, in an attempt to secure compliance by entities involved in the design and construction of covered multifamily dwellings. Each time the A.G. Spanos Defendants designed and constructed covered dwellings that did not comply with the FHA **in one of Plaintiffs' service areas, the A.G. Spanos Defendants frustrated the mission of that Plaintiff**,[4] inasmuch as it served to discourage people with disabilities from living at that dwelling,[5] **and encouraged other entities** involved in the design and construction of covered units to disregard their own responsibilities under the FHA.

74. The A.G. Spanos Defendants' continuing discriminatory practices **have forced Plaintiffs to divert significant and scarce resources to identify, investigate, and counteract the A.G. Spanos Defendants' discriminatory practices**, and such practices have frustrated Plaintiffs' other efforts against discrimination, causing each to suffer concrete and demonstrable injuries.

75. Each Plaintiff conducted site visits, investigations, **surveys and/or tests at the Tested Properties, resulting in the diversion of its resources in terms of staff time and salaries and travel and incidental expenses that it would not have had to expend were it not for the A.G. Spanos Defendants' violations.** FHOM, FHNV, MFHS and FHC each diverted staff time and resources to meet with NFHA staff, receive detailed training concerning the accessibility requirements of the FHA and provide logistical support for NFHA staff. In addition to such support:

a. Plaintiff FHOM conducted **site visits and investigations** at Mountain Shadows and Windsor at Redwood Creek, two properties within its service area.

b. Plaintiff FHNV conducted **a site visit and investigation** at Hawthorn Village, **a property within its service area**.

c. Plaintiff MFHS conducted a site visit and investigation at Battery at Chamblee, a property within its service area.

d. Plaintiff FHC conducted tests at Delano and Arlington at Northwood, two properties **within its service area**.

FAC, ¶¶ 72-75.

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[3] Plaintiffs allege that they are located in Washington, D.C., California, Georgia and Florida. In referring to their "respective communities," plaintiffs cannot be referring to citizens of Nevada, Arizona, Colorado, New Mexico, and Kansas, where many of the apartments sued upon are located.

[4] None of the apartments sued upon is located in any of plaintiffs' "respective communities" or in any of plaintiffs' "service areas." RJN, Exs. 171, 172 and 173.

[5] Plaintiffs' Complaint fails to identify any disabled person who was so discouraged.

D. Relief Sought by Plaintiffs.

Plaintiffs request declaratory and injunctive relief. Among other things, the requested injunctive relief would require the Spanos Defendants to survey all the apartment complexes they constructed throughout the United States since March 13, 1991 and to bring each and every allegedly non-FHAA compliant complex into compliance. FAC, pp. 39-40. Plaintiffs request attorneys' fees and costs, compensatory damages, and punitive damages. FAC, pp. 40-41.

Plaintiffs also seek an order "[e]njoining the Owner Defendants from failing or refusing to permit the retrofits ordered by the Court to be made in their respective properties, to comply with such procedures for inspection and certification of the retrofits performed as may be ordered by this Court, and to perform or allow such other acts as may be necessary to effectuate any judgment against the A.G. Spanos Defendants." FAC, p. 40.

E. "Missing" Allegations.

Conspicuous by their absence, the following allegations do not appear in the Complaint. The Complaint does not allege that any of the Plaintiffs, or any of their members, or indeed any disabled persons, ever attempted to rent an apartment at any of the Subject Properties or that any of the Plaintiffs or their members or any disabled person ever intends to do so.

Plaintiffs do not allege that any member of a protected class under the FHAA has encountered discriminatory conduct at any of the Subject Properties. Nor do Plaintiffs claim they are suing on behalf of any member of a protected class.

Plaintiffs do not allege that they have counseled, spoken to, or otherwise expended any resources in communicating with any member of a protected class who claims to have encountered non-FHAA compliant features in any of the Subject Properties.

Plaintiffs do not allege that any of their "testers" was handicapped. None of the alleged "testers" is named as a plaintiff or identified in the Complaint.

Plaintiffs do not allege facts purporting to show how community organizations with local "service areas" in California, Florida, Georgia, or Washington D.C. were injured by allegedly non-compliant apartment complexes located in New Mexico, Nevada, Arizona, Colorado, Texas, Kansas, and North Carolina. There is, for example, no allegation that noncompliant features in

an untested apartment complex in Kansas in any way caused Fair Housing of Napa Valley to "divert significant and scarce resources" or otherwise frustrated its "mission." Neither Fair Housing of Napa Valley nor any other plaintiff alleges that they counseled, spoke to, or otherwise expended any resources in communicating with any member of a protected class who claimed to have encountered non-FHAA compliant features in a complex located in Kansas or in any other apartment complex designed or constructed by Defendants.

Plaintiffs do not allege that the putative class defendants have violated the FHAA. Plaintiffs do not allege that the putative class defendants caused any injury to plaintiffs. **Plaintiffs do not join as parties any of the tenants who hold leases on the alleged 22,000 units Plaintiffs seek to retrofit. Plaintiffs do not join as parties any of the lenders who hold security interests in any of the apartment complexes sued on.**

F. Matter Subject to Judicial Notice.

As a matter of public record subject to judicial notice, not one of the 85 Subject Properties is owned by defendants A.G. Spanos Development, Inc., A.G. Land Company, Inc. or A.G. Spanos Management, Inc. RJN, Exs. 1-85. Only one of the Untested Properties—located in Kansas—is owned by defendant A.G. Spanos Construction, Inc. RJN, Ex. 48. Only one of the Untested Properties and two of the Tested Properties are owned by defendant The Spanos Corporation. RJN Exs. 14, 20 and 44. The remaining 51 Untested Properties, and 30 of the Tested Properties, are owned by entities other than the Spanos Defendants.[6] RJN, Exs. 1-85.

All but eight of the 85 identified properties sued on were built (and certificates of occupancy issued) more than two years before the Complaint was filed. See RJN, Exs. 91, 103, 105, 125, 126, 129, 158 and 161. The eight exceptions are: (1) Tamarron, located in Phoenix, Arizona; (2) Windsor at Redwood Creek, located in Rohnert Park, California; (3) Sycamore Terrace, located in Sacramento, California; (4) Arlington at Northwood, located in Wesley Chapel, Florida; (5) Delano at Cypress Creek, located in Wesley Chapel, Florida; (6) The Battery

[6] Certified copies of the recorded deeds for two of the 85 properties—located in Georgia (RJN Ex. 46) and Texas (RJN Ex. 85), are not included in the Request for Judicial Notice because Defendants never owned, designed or built those complexes in the first place and have been as yet unable to discover who, in fact, does own those complexes.

at Chamblee, located in Chamblee, Georgia; (7) The Coventry at City View, located in Fort Worth, Texas; and (8) Belterra, located in Fort Worth, Texas. RJN, Exs. 91, 103, 105, 125, 126, 129, 158, and 161.

The last certificate of occupancy for Mountain Shadows was issued on September 5, 2002, and for "The Commons" on July 18, 2002, more than two years before Plaintiffs filed this complaint. See RJN, ¶¶ 102, 110. The last certificate of occupancy was issued on Highpointe Village on December 8, 2003, more than two years before Plaintiffs filed this complaint. See RJN, ¶ 134.

III. STANDARDS GOVERNING MOTIONS UNDER RULE 12(b)(6).

In ruling on a motion to dismiss, the court must accept as true the well-pled allegations of the complaint, as well as all reasonable inferences derived from the facts alleged. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). The court is not required to accept as true conclusionary allegations, unwarranted deductions of fact, or legal conclusions cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). Nor are courts required to "swallow the plaintiff's invective hook, line, and sinker; bald assertions, unsupportable conclusions, periphrastic circumlocutions, and the like need not be credited." *Aulson v. Blanchard*, 83 F.3d 1, 3 (1st Cir. 1996).

In determining whether a complaint fails to state a claim, the court may consider facts alleged in the complaint, documents attached or incorporated into the complaint, and matters of which the court may take judicial notice – without converting the motion to dismiss into a motion for summary judgment. *Barron v. Reich*, 13 F.3d 1370, 1377 (9th Cir. 1994).

IV. ARGUMENT.

A. Plaintiffs' FHAA Claim for Relief Is Barred by the Statute of Limitations As to All But Eight of the Eighty-Five Identified Properties.

1. The FHAA's 2-Year Statute of Limitations Runs from the Last Certificate of Occupancy Issued on Each of the Subject Properties.

The FHAA's 2-year statute of limitations means exactly what it says. *Garcia v. Brockway*, 503 F.3d 1092 (9th Cir. 2007). "An aggrieved person must bring a private civil action under the

FHA for a failure to properly design and construct within two years of the completion of the construction phase, which concludes on the date that the last certificate of occupancy is issued." 503 F.3d at 1101;[7] see, 42 U.S.C. § 3613(a)(l)(A).

Plaintiffs filed this action on June 20, 2007. Hence, any property completed before June 20, 2005, falls outside of the statute of limitations. The statute of limitations has therefore run as to all but eight of the eighty-five identified Subject Properties. See RJN, Exs. 86-170. The eight complexes on which the statute of limitations has not run are: (1) Tamarron, located in Phoenix, Arizona; (2) Windsor at Redwood Creek, located in Rohnert Park, California; (3) Sycamore Terrace, located in Sacramento, California; (4) Arlington at Northwood, located in Wesley Chapel, Florida; (5) Delano at Cypress Creek, located in Wesley Chapel, Florida; (6) The Battery at Chamblee, located in Chamblee, Georgia; (7) The Coventry at City View, located in Fort Worth, Texas; and (8) Belterra, located in Fort Worth, Texas. RJN, Exs. 91, 103, 105, 125, 126, 129, 158, and 161.

2. Plaintiffs' Untimely Claims Cannot be Saved by the Continuing Violation Doctrine, the Discovery Rule or Equitable Tolling.

In *Garcia v. Brockway*, the Ninth Circuit rejected attempts to avoid the statute of limitations by invoking the "continuing violation" doctrine. 503 F.3d at pp. 1097-1098. Observing that a non-compliant building is "more akin to a continuing effect rather than a continuing violation under the FHA," the Ninth Circuit stated:

> Were we to now hold the contrary, the FHA's statute of limitations would provide little finality for developers, who would be required to repurchase and modify (or destroy) buildings containing inaccessible features in order to avoid design-and-construction liability for every aggrieved person who solicits tenancy from subsequent owners and managers. . . . This is not what Congress provided in erecting a two-year statute of limitations for FHA design-and-construction claims. If Congress wanted to leave developers on the hook years after they cease having any association with a building, it could have phrased the statute to say so

[7] To the same effect, see *United States v. Taigen & Sons, Inc.*, 303 F.Supp.2d 1129, 1144 (D. Idaho 2003) (for an FHA case, the alleged violation occurred on "the date the design or construction was completed"); *Thompson v. Mountain Peak Assocs. LLC*, 2006 U.S. Dist. LEXIS 36981, at *8 (D. Nev. June 5, 2006) ("the last act of discrimination occurs upon the completion of the design and construction of the noncompliant structure or complex"); *Moseke v. Miller & Smith, Inc.*, 202 F.Supp.2d 492, 503 (E.D. Va. 2002).

explicitly.

503 F.3d at 1098.

For similar reasons, the Ninth Circuit held that the two-year statute of limitations cannot be extended by either the discovery rule or the equitable tolling doctrine. 503 F.3d at 1100-1101. "Both doctrines would have the same effect as the continuing violation doctrine by tolling the statute of limitations indefinitely and thus stripping it of all meaning." *Id.;* accord, *Moseke, supra,* 202 F.Supp.2d at 504; *Thompson v. Mountain Peak Assocs., LLC, supra,* U.S. Dist. LEXIS 36981, at *8.

3. Plaintiffs Cannot Circumvent the Statute of Limitations by Aggregating Alleged Violations Into A Continuing Practice.

Plaintiffs' "continuous pattern and practice" allegation cannot be used to aggregate discrete acts into a series of related acts to invoke the continuing violation doctrine. In *Nat'l. Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 122 S.Ct. 2061 (2002), the Supreme Court held that discrete acts that fall within the statutory time period do not make timely charges based on acts that fall outside the time period. *Id.* at 113. Instead, "[e]ach discrete discriminatory act starts a new clock for filing charges alleging that act." *Ibid.* In this case, the design and construction of each of the Subject Properties is a discrete act. "There is simply no indication that the term 'practice' converts related discrete acts into a single unlawful practice for the purposes of timely filing." *Id.* at 111.

B. Plaintiffs Have Not Alleged a Cause of Action in Their Own Right Because They Are Not "Aggrieved Persons" Within the Meaning of the FHAA, They Do Not Claim to Belong to the Protected Class, Their Damages Were Voluntarily Incurred, and They Failed to Sue Indispensable Parties.

Plaintiffs have failed to allege facts sufficient to state a cause of action in their own right under the FHAA.[8] They are not "aggrieved persons" within the meaning of the statute, nor do

[8] Though often confused, the question of whether a plaintiff has alleged facts sufficient to state a claim for relief is a separate and distinct question from whether she has alleged facts sufficient to establish standing to sue. *Davis v. Passman*, 442 U.S. 228, 239, n.18 (1979). Each question requires a distinct inquiry. See e.g., *Bernhardt v. County of Los Angeles*, 279 F.3d 862, 868, n.4 (9th Cir. 2002); *Canatella v. Stovitz*, 365 F.Supp. 2d 1064, 1071, 1084 (N.D. Cal. 2005) (denying defendants' 12(b)(1) motion for lack of standing but granting defendants' motion under 12(b)(6) because plaintiff had not stated a cause of action).

they claim to be members of the protected class. Further, Plaintiffs' alleged "damages" were voluntarily incurred, and they have failed to name indispensable parties.

1. Plaintiffs Fail To State A Cause of Action Because They Are Not "Aggrieved Persons."

Under the FHAA, "**An aggrieved person may commence a civil action** . . . not later than 2 years after the occurrence or the termination of an alleged discriminatory housing practice . . . **to obtain appropriate relief** with respect to such discriminatory housing practice. . . ." 42 U.S.C. § 3613(a)(1)(A).

The First Amended Complaint alleges that Plaintiffs are "aggrieved persons":

> As a result of the A.G. Spanos Defendants' wrongful conduct, NFHA and the other Plaintiffs **each have been injured by a discriminatory housing practice and are, therefore, "aggrieved persons" as defined by the FHA, 42 U.S.C. § 3602(i)(l).**

FAC, ¶ 85.

42 U.S.C. section 3602(i)(l) defines an aggrieved person as "any person who . . . claims to have been injured by a discriminatory housing practice;. . . ."

In turn, section 3602(f) defines "discriminatory housing practice" to mean "an act that is unlawful under section 3604. . . ." An "aggrieved person" is therefore "any person who" "claims to have been injured by . . . an act that is unlawful under section 3604."

Section 3604, in turn, makes it unlawful to deny a particular rental to a particular handicapped person (or her associate) who intends to rent, or to have a special rental contract for a particular disabled person (or her associate) who intends to rent a particular apartment. Section 3604(f)(1) states:

> [I]t shall be unlawful –
>
> (f)(1) To discriminate[9] in . . . the rental, or to otherwise make unavailable or deny

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[9] "Discrimination" is defined in 42 U.S.C. section 3604 (f)(3):
(3) for purposes of . . . subsection([f]), discrimination includes:
(C) . . . failure to design and construct [rental] dwellings in such a manner that—
(i) the public use and common use portions of such dwellings **are readily accessible to and usable by handicapped persons**;
(ii) all the doors designed to allow passage into and within all premises within such dwellings are **sufficiently wide to allow passage by**

> a dwelling to any . . . renter . . . .
> (A) . . . because of a handicap of . . . that renter[10];
> (B) . . . because of a handicap of . . . a person. . . intending to reside in that dwelling after it is . . . rented, or made available; or
> (C) . . . because of a handicap of . . . any person associated with that . . . renter . . . .

42 U.S.C. § 3604(f)(1)

Section 3604(f)(1) thus makes it unlawful to discriminate in a rental, resulting in "a dwelling" being made "unavailable" "to any renter" (A) because of a particular handicap of that renter or (B) because of a particular handicap of a particular person who intends to reside in a particular dwelling, or (C) because of a particular handicap of any person associated with a particular renter. This section thus makes it unlawful to make a particular dwelling unavailable to a particular renter (or her associate) because of a particular handicap of a particular person.

Similarly, 42 U.S.C. section 3604(f)(2) provides:

> It shall be unlawful—
>
> (f)(2) To discriminate against any person in the . . . terms, conditions or privileges of . . . rental of a dwelling, . . .
>
> (A) . . . because of a handicap of that person; or
> (B) . . . because of a handicap of . . . a person . . . intending to reside in that dwelling after it is . . . rented, or made available; or
> (C) . . . because of a handicap of . . . any person associated with that person.

> **handicapped persons in wheelchairs**; and
> (iii) all premises within such dwellings contain the following features of adaptive design:
> (I) **an accessible route** into and through the dwelling;
> (II) light switches, electrical outlets, thermostats, and other environmental controls **in accessible locations**;
> (III) **reinforcements in bathroom** walls to allow later installation of grab bars; and
> (IV) **usable kitchens and bathrooms** such that an individual in a wheelchair **can maneuver about the space**.

[10] "Handicap," with respect to a person, means "a physical or mental impairment which substantially limits one or more of such person's major life activities." 42 U.S.C. section 3602(h)(1). *Giebeler v. M&B Associates*, 343 F.3d 1143, 1147 (9th Cir. 2003) On application by a handicapped person harmed by a refusal to rent, the court may appoint an attorney for that party or authorize the commencement or continuation of an action without the payment of fees, costs, or security, if in the opinion of the court that person is unable to bear the costs of that action. 42 U.S.C. section 3613(b).

In short, section 3604(f)(2) makes it unlawful to attach discriminatory "terms, conditions or privileges" to a rental contract for a dwelling (A) because of a particular handicap of a particular person intending to rent; or (B) because of a particular handicap of a particular person who intends to reside in a particular dwelling; or (C) because of a particular handicap of any person associated with a particular renter. At bottom, section (f)(2) makes it unlawful to have a special rental agreement for a particular person (or her associate) with a particular handicap who intends to reside in a particular dwelling.

Plaintiffs have not alleged that they are "aggrieved persons" because they have not alleged, for purposes of section (f)(1), that they have been injured by defendants making a particular dwelling unavailable to a particular renter (or her associate) because of a particular handicap of a particular person. Nor have plaintiffs alleged, for purposes of section (f)(2), that they have been injured by defendants inserting special provisions into the rental contract of a particular person with a particular handicap who intends to reside in a particular dwelling.

Notwithstanding the fact that many of the apartment complexes sued on have been occupied for 15 or more years, plaintiffs do not allege that any handicapped person (or an associate of such a person) has ever intended to rent or been denied a rental at any of the known or unknown complexes sued on. Because plaintiffs do not allege that any handicapped person (or associate) ever intended to rent or has been denied a rental by the Spanos Defendants (or anyone else), plaintiffs have not alleged that the Spanos Defendants have committed an act that is unlawful under 42 U.S.C. section 3604(f)(1) or (f)(2). Because plaintiffs have not alleged an unlawful act, they have not alleged that they have been "injured by an act that is unlawful under section 3604."

Because plaintiffs have not alleged that they have been injured by an act that is unlawful under section 3604, plaintiffs cannot claim to have been injured by a discriminatory housing practice. Therefore, Plaintiffs are not "aggrieved persons" and they do not state a claim for relief under 42 U.S.C. section 3613.

2. Plaintiffs Fail To State A Cause Of Action Because They Do Not Claim To Belong to or Sue on Behalf of Members of the Protected Class.

To state a claim for damages (or other relief) in themselves or on behalf of others under

the FHAA, Plaintiffs must plead that Plaintiffs belong to or sue on behalf of a "class of persons" protected by the FHAA and that a person who is a member of the protected class would have rented housing but for defendants' discriminatory housing practices. See, e.g., *United States v. California Mobile Home Park Mgmt. Co.*, 107 F.3d 1374, 1380 (9th Cir. 1997) (discussing the elements of a prima facie case under 42 U.S.C. § 3604(f)(3)); *Michigan Protection and Advocacy Services, Inc. v. Babin*, 799 F.Supp. 695, 706 (Mich. 1992) (discussing the elements of a prima facie case under 42 U.S.C. § 3604(f)(1)); *Sanghvi v. City of Claremont,* 328 F.3d 532, 536 (9th Cir. 2003) . The class protected under the FHAA consists of persons denied a rental because they are disabled or because they associate with disabled persons. [11]

Plaintiffs do not allege that they (Plaintiffs) were denied a rental because they are disabled (members of the protected class). Plaintiffs do not claim that they were denied a rental because they associate with handicapped persons (also members of the protected class). Moreover, Plaintiffs do not sue on behalf of third party disabled persons. Plaintiffs do not allege that any person having rights under the FHAA has actually been denied a rental by Defendants' alleged conduct. In short, Plaintiffs fail to state a claim for relief under the FHAA in themselves or on behalf of third parties.

Plaintiffs allege only that Defendants' allegedly defective design and construction has caused them to voluntarily divert resources which they would otherwise have used in their other activities and that their "missions" have therefore been frustrated. This allegation has been held to be deficient in the context of the ADA: the "ADA provides [plaintiffs] no remedy" for their

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[11] *See also*, *Barlow v. Evans*, 993 F.Supp. 1390, 1392 (D. Utah 1997) ("In order to establish a prima facia case, [plaintiff] must first establish that they are members of a class of persons intended to be protected under the FHA.") A person is a member of a protected class, for the purposes of the Act, when "they are the direct object of the statutory protection." *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1503 (10th Cir. 1995). "[A] violation of the . . . Fair Housing Act . . . requires more than the mere design and construction of a noncompliant housing unit." *Garcia v. Brockway*, *supra*, 503 F.3d at 1105 (Fisher dissenting). "[An] improperly designed building . . . [is] much like a potentially dangerous ditch into which no one has yet fallen - - capable of inflicting harm and violating the law, but not yet actually doing either." *Id.* It is only when disabled persons come "into contact with the defective buildings . . . that [they become] victims of discriminatory housing practices . . . ." 503 F.3d at 1105 (Fisher, dissenting). A disabled plaintiff who has suffered no harm has no "cause of action." 503 F.3d at 1105 (Fisher, dissenting).

claims that plaintiffs have suffered frustration-of-mission injuries as a result of defendants' discrimination against others. *Clark v. McDonald's Corp.*, 213 F.R.D. 198, 209 (D.N.J. 2003). For the same reason, Plaintiffs' allegation also fails under the FHAA.[12]

3. Plaintiffs Have Failed to State a Claim for Damages Because, as Alleged, Their "Damages" Were Voluntarily Incurred.

Plaintiffs allege only a ***self-inflicted*** diversion of resources, not in response to any complaint about the Subject Properties. See Complaint at ¶¶ 68-74. "To the extent that an injury is self-inflicted . . . , the causal chain is broken." Moore's Federal Practice 3D, §101.41[4]. Nor can mere "testing" and litigation expense satisfy the standing requirement. Moore's Federal Practice 3D, §101.41[4], citing *Fair Housing Council of Suburban Philadelphia v. Montgomery Newspapers*, 141 F.3d 71, 80 (3d Cir. 1998).

4. Plaintiffs Have Failed to State a Claim for Injunctive Relief Because Plaintiffs Have Not Named the Owners, Renters, and Secured Lenders of the Subject Properties.

Plaintiffs allege, correctly, that all current owners are "necessary parties in order to effectuate any judgment or order for injunctive relief requested by plaintiffs." FAC, ¶ 30.

Rule 19(a)(2)(i), fundamental due process, and 42 U.S.C. § 3613(d) require that current owners, renters, and secured lenders of the properties sued upon be given notice and an opportunity to be heard. The current owners are entitled to present evidence to this court showing that properties owned by them actually comply with the accessability requirements of the FHAA and that no disabled person has ever been harmed by alleged inaccessibility of the subject properties. Tenants have a property right not to be ousted from their homes or deprived of the benefit of their leaseholds without notice and opportunity to be heard. Secured lenders, who have made loans to owners and secured those loans with deeds of trust on the apartments sued on, cannot have those deeds of trust impaired without notice and an opportunity to be heard.

This due process standard is codified in 42 U.S.C. § 3613(d) as follows:

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[12] Because of the similarities between the two acts, courts often look to and rely on ADA cases in applying the FHAA. See *Tsombanidis v. W. Haven Fire Dep't.*, 352 F.3d 565, 573 (2d Cir. 2003); *Giebeler v. M&B Associates*, 343 F.2d 1143, 1149 (9th Cir. 2003). *Hansen v. Liberty Partners, LLC*, 2005 U.S. Dist. LEXIS 39187 * 22-23 (M.D. Tenn 2005).

> Relief granted under this section **shall not affect any contract, sale, encumbrance, or lease consummated** before the granting of such relief and involving a bona fide purchaser, encumbrancer, or tenant, **without actual notice of the filing of a . . . civil action under this subchapter**.

An injunction requiring the retrofit of individual units leased by renters adversely affects the property rights of renters and secured lenders. No such injunction may issue unless the renters and secured lenders are given notice and have opportunity to be heard.[13] Plaintiffs in this case have not even attempted to join the tenants and secured lenders.

Plaintiffs concede that the current owners are necessary parties. FAC, ¶ 30. Yet, they named only two current owners: Knickerbocker Properties, Inc. XXXVIII and Highpointe Village, L.P. As noted, all claims against these defendants are barred by the two-year statute of limitations. No effort was made to join the other current owners, perhaps because Plaintiffs recognize that this Court does not have personal jurisdiction over them.

In an attempt to get around that problem, Plaintiffs have alleged the existence of a defendant "owner" class and have named Knickerbocker and Highpointe as class representatives. FAC, ¶¶ 32-37. However, this stratagem fails. First, the fact that the claims against both class representatives are time-barred renders them "inadequate" under Rule 23. It also fails to solve the jurisdictional problem: in the absence of an opt-out mechanism, Plaintiffs will have to establish personal jurisdiction as to each current owner.[14] Given the owners' locations through the United

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[13] See, *H.J.M. v. K. Hovnanian at Mahwah VI, Inc.*, 672 A.2d 1166, 1172 (N.J. Sup. Ct. 1996); *Equal Rights Center v. Post Properties, Inc.*, 2007 U.S. Dist. Ct., LEXIS 53462 *5-6. (D.C. 2007); see, also, Fed.R.Civ.P. 19(a)(2)(i); *Schneider v. Whaley*, 417 F.Supp. 750, 757 (S.D. NY 1976) (tenants had a "protected interest at stake" in the housing authority's policy-making and were thus entitled to notice and an opportunity to submit evidence and argument).

[14] Lack of personal jurisdiction over absent class members triggers due process concerns even in plaintiff class actions, in which, typically, no relief is sought against the absent class members and – in any event – the absent class members can "opt out" if they chose not to participate in the lawsuit. See, *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 811-12, 105 S. Ct. 2965 (1985). "Presumably, a defendant class would not present the same problems [as posed in *Shutts*] because, unlike the situation with a plaintiff class, the forum court must have personal jurisdiction over each member of a defendant class." *Whitson v. Heilig-Meyers Furniture, Inc.*, 1995 U.S. Dist. LEXIS 4312, *49 (N.D. Ala. 1995) (emphasis added); see, also, *National Assn. for Mental Health, Inc. v. Califano*, 717 F.2d 1451, 1455 (D.C. Cir. 1983) (affirming district court's order refusing to certify a defendant class where

States, Plaintiffs have not even alleged that this Court has personal jurisdiction over members of the absent defendant class.

C. Plaintiffs Have Failed to State a Claim for Relief under the FHAA Against the Spanos Defendants Because Plaintiffs Fail to Allege That the Spanos Defendants Actually Denied, or Could Actually Deny, a Rental to Anyone.

"Plaintiffs' discrimination claim is . . . not permitted under the Fair Housing Act which concerns discrimination by providers of housing, such as owners, landlords, and municipal service providers against tenants and potential tenants." *Hotel St. George Associates v. Benjia Morgenstern, et al.*, 819 F.Supp. 310, 319 (S.D. NY 1993).

As explained above, 42 U.S.C. sections 3604(f)(1) and (f)(2) make it "unlawful" to deny a rental to a particular disabled person with a particular disability who wishes to rent a particular apartment. It is landlords - not builders - who are in a position to deny the rental of a particular apartment to a particular disabled person who wishes to rent:

> The "failure to design and construct" language of 3604(f)(3)(C) might be thought to limit the targets of this provision to those who 'design' or 'construct' covered multi-family dwellings, but this interpretation seems wrong. As one court has observed, 3604(f)(3)(C) "is not a description of who is liable. Rather, it is a description of what actions constitute discrimination."

R. Schwemm, "Barriers to Accessible Housing: Enforcement Issues in Design and Construction Cases under the Fair Housing Act," 40 U. Richmond L.Rev. 753, 776 (2006).

"[T]he purpose of [the FHAA] is to protect the housing choices of handicapped individuals who seek to buy or lease housing and of those who seek to buy or lease housing on their behalf. The conduct and decision-making that Congress sought to affect . . . was that of persons in a position to frustrate such choices – primarily . . . those who own the property of choice and their representatives." *Growth Horizons, Inc. v. Delaware County*, 983 F.2d 1277, 1283 (3d Cir. 1993). "[A]fter a noncompliant building has already been built . . . injunctive relief is only meaningful against the person currently in control of the building." *Lonberg v. Sanborn Theatres,* 259 F.3d 1029, 2001 U.S.App.LEXIS 17418 at * 18 (9th Cir. 2001). "[The] presence [of the

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the named representatives would not "fairly and adequately protect the interests of the class" and where the district court did "not have in personam jurisdiction over the class members").

current owner] as a party . . . appears imperative in order to afford full relief." *Baltimore Neighborhoods, Inc. v. Rommel Builders, Inc.*, 40 F.Supp.2d 700, 712 (D. Md. 1999).[15]

D. The Complaint Fails to Allege Facts Sufficient to Establish Standing.

1. Plaintiffs Do Not Claim To Be Members of a Protected Class under the FHAA, Nor Do They Purport to Sue on Behalf of Any Member of a Protected Class; Therefore, They Have No Standing to Sue.

To have standing to sue, Plaintiffs must be members of the class of persons protected under the FHAA, or they must sue on behalf of members of the protected class. As explained in *Wasserman v. Three Seasons Assoc. No. 1, Inc.*, 998 F. Supp. 1445 (S.D. Fla. 1998):

> Plaintiffs do not dispute that they are not members of a class protected under the FHA. Rather, they contend that they are entitled to standing as "aggrieved persons" under the FHA. . . . The Supreme Court jurisprudence applying the "aggrieved persons" provision of the FHA makes clear that an "aggrieved person" is not just any non-class member who protests what he perceives to be a discriminatory housing policy. Rather, an "aggrieved person" is a non-class member who (1) suffers actual injury as an ancillary effect of present or imminent discrimination against a protected class member and (2) challenges the discriminatory policy on behalf of that class member.

Id., 998 F.Supp., 1446-1447.

Stated another way, Plaintiffs may establish standing only if Plaintiffs can "show that the [defendant] interfered with the housing rights of [individuals protected under the FHAA] and that, as a result, [plaintiffs] suffered an actual injury." *San Pedro Hotel, Inc. v. City of Los Angeles,* 159 F.3d 470, 475 (9th Cir. 1998); see, also, *Nur v. Blake Development Corp.*, 655 F.Supp. 158, 163 (N.D. Ind. 1987).

In this case, Plaintiffs do not claim to be disabled renters, nor do they sue on behalf of disabled renters who claim to have been denied a rental at any of the facilities sued upon. Therefore, Plaintiffs lack standing to bring this action.

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[15] Professor Schwemm explains: "Well established tort principles, which were in place at the time of the 1988 FHAA's enactment and which continue in force today, provide for liability for residential landlords based on their property's defects, even if such a landlord had no role in causing those defects and so long as he has had sufficient time to discover and correct the defects." (40 U. Richmond L.Rev. at 797-798.) Commercial landlords are also in a position to place "indemnity" agreement provisions into their contract to purchase an apartment building from a prior owner or prior developer.

The "full limits of Art. III" may -- in certain circumstances not present here -- allow an organization that has been "genuinely injured by conduct that violates someone's [statutory] rights," to sue on behalf of and "prove that the rights of another were infringed" resulting in harm to that other person. *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 103, n. 9. (1979). What *Gladstone* teaches is that to have a "case or controversy" someone who holds substantive rights under the statute in question must have suffered a harm caused by defendants' violation of the statute. Then, an organization that has been genuinely injured by conduct that harms that third person may sue to redress that harm. *Id.*

But Plaintiffs do not claim to sue on behalf of a person or entity (the class of persons) that holds "substantive rights" under the FHAA. Rather, Plaintiffs sue solely in their own right. Therefore, since Plaintiffs do not belong to the class of persons protected under the FHAA, and do not sue on behalf of these persons, Plaintiffs do not have standing to sue.

2. Plaintiffs Do Not Allege Facts Sufficient To Establish the "Irreducible Constitutional Minimum" for Standing.

Standing is a "threshold question in every federal case." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). It is a jurisdictional requirement, and a party invoking federal jurisdiction bears the burden of establishing standing. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561 (1992).[16] Each element of standing is "an indispensable part of the plaintiff's case." *Id.* Federal courts are diligent in observing standing requirements. *B. C. v. Plumas Unified School Dist.*, 192 F.3d 1260, 1264 (9th Cir. 1999) (holding that federal courts are required to examine jurisdictional issues, such as standing, even *sua sponte* if necessary).

To meet the Article III "irreducible constitutional minimum" of standing, Plaintiffs must meet a three-pronged test:

> First [they must have] suffered an injury in fact - an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the

[16] Every plaintiff asserting a claim for relief must meet the constitutional requirements of standing by showing that it is "entitled to have the court decide the merits of the dispute or of particular issues," and that there exists "a 'case or controversy' between [the plaintiff] and the defendant within the meaning of Article III." *Warth v. Seldin*, *supra*, 422 U.S. at 498; *accord*, *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982).

> injury and the conduct complained of . . . . Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan, 504 U.S. at 560-61 (citations and internal quotation marks omitted); *Friends of the Earth, Inc. v. Laidlaw Envtl. Services*, 528 U.S. 167, 180-181 (2000).

These elements must be established "separately for each form of relief sought" and for each claim brought by the party invoking federal jurisdiction. *Laidlaw*, *supra*, 528 U.S. at 185; *Lewis v. Casey*, 518 U.S. 343, 358, n. 6 (1996) ("[S]tanding is not dispensed in gross."); see also *Blum v. Yaretsky*, 457 U.S. 991, 999 (1982) ("Nor does a plaintiff who has been subject to injurious conduct of one kind possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which he has not been subject."). Accordingly, Plaintiffs in this case must allege a concrete and particularized injury causally connected to Defendants' alleged conduct, for each of the alleged Subject Properties.

Plaintiffs have not alleged that they "suffered **an injury in fact - an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical**" which was **caused** by Defendants' alleged conduct. Instead, Plaintiffs' "injury" is alleged to be a "frustration" of their "mission" and a diversion of their resources away from their alleged usual activities to investigation of the Subject Properties and litigation against the Defendants. FAC, ¶¶ 72-75.

Diversion of resources and "frustration" of "mission" cannot support standing unless they were caused by Defendants' alleged conduct. See, e.g., *Independent Housing Services of San Francisco v. Fillmore Center Associates*, 840 F.Supp. 1328, 1336 (N.D. Cal. 1993); *accord*, *Fair Housing of Marin v. Jack Combs*, 285 F.3d 899, 904-905 (9th Cir. 2002), *cert. denied*, 573 U.S. 1018 (2002). Plaintiff in *Independent Housing Services of San Francisco* alleged that it had spent money referring, counseling, and placing disabled people who had encountered accessibility barriers at the Fillmore Center. 840 F.Supp. at p. 1336. Similarly, in *Fair Housing of Marin* plaintiff alleged that it had spent money in responding to citizen complaints against the defendant, over and above litigation expenses. 285 F.3d at p. 905. Both stated a sufficient causal

relationship between the alleged injury and defendant's alleged conduct.[17]

Moreover, any claim of diversion of resources for referring, consulting, and placing disabled persons necessarily requires allegations that plaintiffs counseled specific disabled persons who wished to live at the apartment complex sued upon. *See*, *Gladstone, Realtors v. Bellwood, supra*, 441 U.S. 91, 112-115; *see also TOPIC v. Circle Realty*, 532 F.2d 1273, 1275 (9th Cir. 1976), *cert. denied*, 429 U.S. 859 (purported plaintiffs were spread out over such a wide metropolitan area that role played by alleged racial steering was so attenuated as to negate existence of any injury in fact).

In contrast, the complaint before the Court does not allege that any member of a protected class encountered non-FHAA compliant features at any of the Subject Properties. Plaintiffs do not allege that they received any complaints about the Subject Properties, that they counseled, referred or placed anyone who had encountered such problems, or that they otherwise responded to complaints about any of the Subject Properties.

Plaintiffs allege only a *self-inflicted* diversion of resources, not in response to any complaint about the Subject Properties. See FAC at ¶¶ 72-75. "To the extent that an injury is self-inflicted . . ., the causal chain is broken." Moore's Federal Practice 3D, §101.41[4].

Nor can mere "testing" and litigation expense satisfy the standing requirement:

> Litigation costs, even those that may be concrete and particularized, do not suffice to establish standing. An organization cannot obtain standing to sue in its own right as a result of self-inflicted injuries that are not fairly traceable to the defendant's conduct. Thus, allegations of injury in fact based on the expenditure of resources incurred in enforcement litigation fail to establish standing.

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[17] The Ninth Circuit's decision in *Smith v. Pacific Properties and Development Corp.*, 358 F.3d. 1097 (9th Cir. 2004) is not inconsistent. Plaintiffs in that case were a disabled "tester" and the "Disabled Rights Action Committee ("DRAC"). After dismissing the complaint for lack of standing, without leave to amend, the Nevada District Court denied DRAC's motion for reconsideration. The court did not explain its order, nor did it offer a reason for not granting leave to amend. Under these circumstances, the Ninth Circuit reversed, holding that the trial court had abused its discretion in refusing to grant leave to amend, and that the plaintiff should have been allowed an opportunity to amend. See 358 F.3d at 1105-1106. This was consistent with the Supreme Court's ruling in *Havens, supra*, that the plaintiffs therein should have been allowed to amend their complaint. 455 U.S. at 377-378. In *Smith*, DRAC had "indicated that it would be capable of amending its complaint upon remand to clearly come within the *Fair Housing [of Marin]* requirement on the merits of the standing inquiry." 358 F.3d at 1106, n. 10.

> Expanding the definition of Article III injury to include an organization's litigation-related expenses would imply that any sincere plaintiff could bootstrap standing simply by expending its resources in response to the actions of another.

Moore's Federal Practice 3D, §101.41[4]; see *Association for Retarded Citizens v. Dallas County Mental Health & Mental Retardation Ctr. Bd. of Trustees*, 19 F.3d 241, 244 (5th Cir. 1994); see also, *Walker and Fair Housing Foundation of Long Beach v. City of Lakewood,* 272 F.3d 1114, 1124, n.3 (9th Cir. 2001).

In the absence of any allegation that Plaintiffs were forced to divert resources because of Defendants' harm to disabled persons, Plaintiffs have not "suffered **an injury in fact - an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical**" and which was **caused** by Defendants' alleged conduct. While this is true as to all the Subject Properties, it is most obviously true of the "Untested Properties" which Plaintiffs admit they did not "test" and the Unknown Properties the identities and locations of which Plaintiffs admit are "unknown" to them. FAC, ¶ 28.

Nor have Plaintiffs met the third prong of Article III standing: "redressability." They have sued for injunctive relief under the FHAA without serving the owners of the Subject Properties scattered throughout the United States, the tenants currently residing in the thousands of apartment units that would have to be rebuilt or retrofitted, or the secured lenders on the Subject Properties. See, Moore's Federal Practice 3D, § 101.42[5].

3. Plaintiffs Have Not Alleged Facts Sufficient to Establish Standing to Seek Damages.

An organization that does not allege that it was denied housing has no standing to seek damages under the FHAA. *Wein and Access Now, Inc. v. American Huts, Inc.*, 313 F.Supp.2d 1356, 1360-1361 (S.D. Fla. 2004). Accordingly, even if they had standing to seek injunctive relief – and they do not – the Plaintiffs have no standing to seek damages.

4. Plaintiffs Have Failed to Allege Facts Sufficient to Establish Standing to Seek Injunctive Relief Under The FHAA re The Subject Properties.

Standing is not dispensed "in gross." Rather, a plaintiff must demonstrate standing separately for each form of relief sought (injunction, damages, civil penalties, etc.). *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc., supra,* 528 U.S. at 184. Before a court

will order a business to undergo the expense of rebuilding or retrofitting facilities to comply with the FHAA, courts first require that plaintiff show that it has **standing to seek injunctive relief**:

> In order to establish an injury in fact sufficient to confer standing to pursue injunctive relief, the Plaintiff must demonstrate a "real or immediate threat that the plaintiff will be wronged again - - a likelihood of substantial and immediate irreparable injury." [citation omitted] In evaluating whether an ADA plaintiff has established a likelihood of future injury, courts have looked to such factors as: (1) the proximity of the place of public accommodation to plaintiff's residence, (2) plaintiff's past patronage of defendant's business, (3) the definitiveness of plaintiff's plans to return, and (4) the plaintiff's frequency of travel near defendant.

Molski v. Mandarin Touch Restaurant, 385 F.Supp.2d 1042 (C.D. Cal. 2005). This same test applies under the FHAA. To have standing to seek injunctive or declaratory relief under the FHAA, plaintiff must actually live at or intend to live at the apartment complex sued on. (See, e.g., *Harris v. Itzhak*, 183 F.3d 1043, 1050 (9th Cir. 1999) (Plaintiff's request for declaratory and injunctive relief rendered moot by her departure from the complex).

The same is true for the public areas of the Subject Properties. "Allegations that a plaintiff has visited a public accommodation on a prior occasion and is currently deterred from visiting that accommodation by accessibility barriers establish that a plaintiff's injury is actual or imminent." *Doran v. 7-Eleven Inc.*, 2007 U.S. App. LEXIS 26143, * 9 (9th Cir. 2007). In addition, plaintiffs have standing to seek injunctive relief only for those violations related to plaintiffs "specific disability." *Ibid.*

Regarding "proximity," the district court in *Molski v. Mandarin Touch* determined that the plaintiff's residence was over 100 miles from the defendant Mandarin Touch Restaurant in Solvang, California, a fact which weighed heavily against standing to sue for injunctive relief. 385 F.Supp. at p. 1045. In the instant case, Plaintiffs do not even pretend to have met the "proximity" test: they allege that they are located in California, Florida, Georgia, and Washington D.C. and that the Subject Properties are located throughout the United States, e.g., in New Mexico, Nevada, Arizona, Colorado, Texas, Kansas, and North Carolina. Plaintiffs obviously fail the "proximity" test.[18] For the same reason, Plaintiffs do not allege, and cannot show,

[18] See also, *Gladstone Realtors v. Bellwood*, *supra*, 441 U.S. 91, 112, n25 (refusing to grant standing to individual plaintiffs that did not live in the community in which the alleged discrimination occurred); *Conservation Law Found. of New England v. Reilly*, 950 F.2d 38, 43 (1st Cir. 1991) (Denying standing to plaintiff entity seeking nationwide injunctive relief under

"frequency of travel" near the Subject Properties or likelihood that they will return to the Subject Properties.

And there is an even more basic reason why these plaintiffs cannot establish standing to sue for injunctive relief. Because Plaintiffs are not themselves disabled and because Plaintiffs do not sue on behalf of disabled persons, Plaintiffs can never show a "likelihood of substantial and immediate irreparable injury" to themselves. No Plaintiff (and no identified disabled person) resides near any of the Subject Properties. No Plaintiff (and no identified disabled person) ever attempted to rent an apartment at any of the Subject Properties. No Plaintiff (and no identified disabled person) plans to rent at any of the Subject Properties. In short, Plaintiffs fail to allege any facts that demonstrate that they (or any identified disabled person) will likely suffer "substantial and immediate irreparable injury."

V. CONCLUSION.

For the foregoing reasons, Defendants' Motion to Dismiss should be granted in its entirety. Alternatively, if the Court grants this motion only with respect to the statute of limitations, the complaint should be dismissed as to all the Subject Properties other than the eight (8) properties listed in Section IV.A.1, *supra*. Further – and again in the alternative – even if this Court concludes that Plaintiffs may proceed on some of the Tested Properties, defendants request that First Amended Complaint be dismissed as to the Untested and Unknown Properties, as to which Plaintiffs have clearly failed to state facts sufficient to establish standing and to state a claim upon which relief may be granted.

Dated: December 21, 2007

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By _____
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CERCLA at approximately 1200 facilities, the court stated: "The absence of plaintiffs from the majority of regions of the country in this case demonstrates the lack of 'concrete factual context conducive to a realistic appreciation of the consequences of judicial action.").